Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of | ) | |
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| BellSouth Corporation's Petition for Waiver | ) | WC Docket No. 05-277 |
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# REPLY COMMENTS OF COMPTEL

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COMPTEL, by its attorney, hereby respectfully submits its reply comments in the above-referenced proceeding in response to BellSouth's request for a waiver of dominant carrier tariffing obligations for non-access interLATA services, price cap regulation of long distance offerings, and accounting rules related to the integrated provision of in-region, interexchange services after the sunset of the separate affiliate requirements of section 272 of the Communications Act, as amended.[1] COMPTEL agrees with Sprint that BellSouth has failed to demonstrate that "good cause" supports the grant of the requested waiver.[2] To the contrary, as set out in greater detail below, the current state of local and long distance competition cries out for the adoption of additional competitive safeguards, not the

[1] 47 U.S.C. § 272.

[2] Sprint Comments at 3.

elimination of those few safeguards that remain in place.

COMPTEL notes at the outset that the issues raised in BellSouth's waiver petition are squarely presented in the Commission's pending rulemaking proceeding regarding the adoption of additional safeguards beyond the statutory sunset of the provisions of section 272.[3] Specifically, the Commission sought comment on "the continued need for dominant carrier regulation" after the sunset of section 272 of the Act.[4] Because the issues raised in that pending rulemaking have industry-wide implications, it would be inappropriate and grossly inefficient for the Commission to grant piecemeal waivers of rules and safeguards of general applicability. As such, BellSouth is not entitled to the special treatment it seeks in the instant waiver petition.

BellSouth claims that its plans to market in-region services are "seriously complicated" by current FCC rules that bar the company from discriminating against competing service providers. As evidenced by enforcement action taken against BellSouth after its entry into the long distance market, BellSouth has been perfectly willing to simply ignore those "complicating" regulations and discriminate against competitive providers by

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[3] Notice of Proposed Rulemaking, *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, 17 FCC Rcd 9916 (2002) (272 NPRM); *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules,* WC Docket No. 02-112, Further Notice of Proposed Rulemaking, 18 FCC Rcd 10914 (2003) (272 FNPRM).

[4] 272 FNPRM at ¶ 2.

refusing to comply with the very rules it now seeks to waiver.[5] Having changed its strategy from violating the rules to instead seeking their elimination, BellSouth now claims that because it is a "mid sized carrier" compared with SBC and Verizon, and because BellSouth only has "11% of total access lines nationally," any safeguards that apply to SBC and Verizon should not apply to BellSouth.[6] Of course, BellSouth's share of the nationwide local access market – if one exists – are irrelevant for purposes of calculating the need for competitive safeguards, because BellSouth's local exchange monopoly in its nine state territory is paramount. According to the FCC's data, BellSouth controls over 80% of local access lines in its nine-state monopoly region.[7] The same can be said of BellSouth's claims to have a miniscule share – less than 6% -- of the nation's long distance revenue.[8] According to the BellSouth's own recent data, presented as part of its third

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[5] In the Matter of File No. EB-03-IH-0616, BellSouth Telecommunications, Inc., EB Docket No. 03-197, Apparent Liability for Forfeiture (2004). Similarly, Verizon was found in violation of section 272 safeguards and entered into a consent decree with the Commission after the Commission found that (1) Verizon's non-regulated affiliate provided certain operations, installation and maintenance functions to a Verizon affiliate in violation of section 272, (2) the BOC obtained pre-paid calling card services from the Verizon 272 affiliate without soliciting bids from other qualified firms, (3) Verizon's service representatives did not inform some customers of their right to choose a long-distance carrier other than the Verizon 272 affiliate, and (4) Verizon did not properly and/or timely post certain affiliate agreements on its website. In the Matter of File No. EB-03-IH-0245, File No. EB-03-IH-0550, Verizon Telephone Companies, Inc., Consent Decree, at ¶ 5. (2004). Verizon paid $300,000 to the U.S. Treasury to settle the investigation without admitting any wrongdoing. SBC and Qwest have also repeatedly failed to comply with statutory requirements and Commission rules.

[6] BellSouth Waiver Petition at 24.

[7] *See* Local Competition: Status as of December 31, 2004, Industry Analysis Division, Wireline Competition Bureau, FCC, at Table 1.

[8] BellSouth Waiver Petition at 25.

quarter 2005 operating results, BellSouth controls 56% of the long distance market in its nine state incumbent territories.[9] BellSouth's claim that competitive safeguards are no longer needed because of its "relatively small share of the national long distance market" is a red herring argument that the Commission should reject.

In short, BellSouth remains the dominant market force in both local access and long distance services in its incumbent territory. COMPTEL agrees with Sprint that the safeguards at issue in this waiver petition are "necessary because of the BOCs' market power in their region."[10] BellSouth controls the transmission facilities and services necessary for competitive entry, and the safeguards that BellSouth seeks to eliminate are the only protection against discriminatory treatment of competitors by BellSouth. Moroever, as Sprint notes in its comments, those companies that BellSouth pretends are its peers – the small, independent incumbents – are actually saddled with tariffing, separate affiliate, and accounting requirements that are very similar to the regulations BellSouth seeks to eliminate.[11]

As COMPTEL argued to the Commission in comments filed in its pending rulemaking proceeding on post-section 272 sunset safeguards, section 272 incorporates vital structural and nondiscrimination safeguards,

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[9] BellSouth 3Q 2005 investor presentation, available at http://www.bellsouth.com/investor/pdf/3q05p_slides.pdf.

[10] Sprint Comments at 7.

[11] Sprint Comments at 4. *See, e.g.* 47 C.F.R. § 64.1903(b)(1) (separate affiliate requirements and accounting restrictions imposed on independent LECs).

the absence of which necessitate the adoption of performance metrics and standards for special access and unbundled network elements (UNE) provisioning to prevent BOC discrimination against nonaffiliated long distance providers.[12] The Commission has been contemplating adoption of concrete rules to measure performance and punish poor provisioning for years.[13] Notwithstanding the extensive record compiled in those proceedings, the Commission has taken no action, and competitive carriers continue to experience significant provisioning delays and denials.

The story of such competitive measures, sadly, has been one of half-steps. For example, although the Commission has tightened its collocation rules in recent years, it has never adopted federal standards, metrics, or even a collocation provisioning interval, despite repeatedly suggesting that such a federal standard was vital to competitive entry.[14] The FCC also has yet to act to resolve faulty and time-consuming provisioning of transmission facilities by adopting federal special access and UNE performance metrics and penalties. Competitive carriers continue to experience extraordinary delays,

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[12] COMPTEL Comments, WCB Docket No. 02-112 (filed Aug. 5, 2002). *See also* Sprint Comments at 17 (Commission must act on pending performance metric proceedings related to UNEs and special access before acting on the instant waiver request).

[13] Notice of Proposed Rulemaking, Performance Measurements and Standards for Unbundled Network Elements and Interconnection, CC Docket No. 01-318 (2001); Notice of Proposed Rulemaking, Performance Measurements and Standards for Interstate Special Access Services, CC Docket Nos. 01-321 (2001).

[14] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 17806 (2000) (noting that timely provisioning of collocation space is essential to a CLEC's ability to compete effectively, and that absent national standards, ILECs will continue to delay unreasonably CLEC build-out of their own facilities).

denials and overcharges in seeking to purchase UNEs and special access. Because of the lack of specific, enforceable rules requiring provision of functioning transmission facilities to requesting carriers in a timely and reliable manner, BOCs have been given a free pass to deny, delay, and degrade the facilities they provide to requesting carriers. It is impossible to imagine that the Commission would lift the few remaining competitive safeguards on BOC provisioning of long distance services before taking the necessary steps to ensure that non-BOC service providers can access the transmission inputs necessary to compete.

Given that BOC entry into the long distance marketplace is complete, and that pending Bell mergers with interexchange carriers threaten to further strengthen the Bell stranglehold on the all-distance communications market, the Bell companies will now control the market for services to enterprise customers who previously would obtain many private line services from competitive access providers (CAPs) or interexchange carriers (IXCs). As Sprint argues in its comments, competitive carriers "have seen loss of market share to BellSouth and other BOCs, as those carriers exploit their dominance of the local exchange and exchange access markets to win long distance and enterprise customers."[15] But alternative service providers need access to the inputs that, absent Commission adoption of competitive safeguards, will be under the exclusive control of the BOCs, who have both

[15] Sprint Comments at 12.

the ability and incentive to discriminate in favor of their own retail and affiliate operations. The Bells now have an even greater incentive to provide inferior provisioning or maintenance and repair services to wholesale consumers of special access circuits, thereby creating an artificial competitive advantage as the BOCs market their superior quality special access services to retail customers or their Section 272 affiliates. Removing those few remaining safeguards, as proposed by BellSouth in its waiver request and endorsed by SBC, Verizon, and Qwest in their comments, would further dampen competitive prospects.

In its post-272 sunset rulemaking proceeding, the Commission noted that Congress intended section 272 to apply only temporarily to BOCs after they gained approval, pursuant to section 271 of the Act, to offer in-region, interLATA services.[16] Clearly, Congress expected that the local markets would be genuinely open to competition before a BOC obtained 271 approval and further hoped that during the following three-year period, competition would flourish such that the safeguards prescribed in section 272 would no longer be necessary and that the Commission might not need to extend them. Congress could not have intended or foreseen, however, that the Bell companies would promptly come to dominate theie in-region long distance markets or that they would purchase their largest nascent competitors and so remove them as competitors against them. Competitive carriers continue to

[16] 272 NPRM at ¶ 8.

receive discriminatory treatment in states where BOCs now provide in-region long distance services, even *with* the Section 272 safeguards in place. To remove those safeguards, along with related pro-competitive accounting measures, would do nothing but further encourage anti-competitive behavior and forestall the growth of competition. The benefits of maintaining the safeguards, in order to continue monitoring the BOCs' business practices to eliminate discriminatory and other anti-competitive behavior, far outweigh any potential burden to the BOCs in maintaining the safeguards. As Sprint argues in its comments, "[e]xempting BellSouth from these rules would seriously undermine deterrence of competitive abuses, because these acts would be rendered virtually undetectable."[17]

Notwithstanding BellSouth's waiver request, the Commission must immediately adopt and impose performance metrics and standards for special access and UNE provisioning. Even if the section 272 safeguards are ultimately eliminated, the nondiscrimination requirements of the Act remain; therefore, the Commission must, at the very least, adopt reporting requirements, metrics and standards to help ensure the BOCs provide nondiscriminatory access to their facilities. BOCs have the incentive to raise their rivals' costs, to decrease the quality of rivals' service offerings, and to increase the time to deploy competitive services.[18] Properly constructed

[17] Sprint Comments at 13.

[18] *See* Sprint Comments at 12-13.

measurements and standards will enable regulators and industry members to detect such discrimination and, when linked to adequate self-effectuating remedies, might also effectively deter BOCs from engaging in such discrimination.

Finally, although BellSouth argues that the requirement to keep its relationship with its retail affiliates above-the-table is a regulatory burden, the Commission should recognize that, like the adoption of performance metrics, such policing mechanisms do not impose significant new burdens either on regulators or the industry.[19] In fact, adoption of performance metrics can reduce discrimination merely because a measurement process is in place. Performance measurements create a public record of obligations and oversight and increase the likelihood of detection, which deters bad behavior, and thus reduces the need for enforcement action and similar regulatory remedies. Furthermore, regulatory oversight would be further streamlined through adoption of self-effectuating remedies. Explicit metrics and standards would give these well-intentioned wholesale providers the guidance they need to provision adequately.

In conclusion, the Commission should deny the waivers requested by BellSouth and since endorsed by its fellow BOCs. Instead, the Commission should immediately adopt concrete, specific, and enforcement performance metrics and penalties for UNEs and special access services.

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[19] These "regulatory burdens" have not prevented BellSouth from raising its long distance in-region market share from 0% to 56% in only three years since market entry. *See supra* n.9.

Respectfully submitted,

/s/ Jason Oxman

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